IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 6, 2006 Session

LISA DONNELLY GELFAND, ET AL. v. JO ANN COOK, ET AL.

Appeal from the Probate Court for Unicoi County
No. PR6-502 David R. Shults, Judge

No. E2005-02611-COA-R3-CV - FILED NOVEMBER 21, 2006

Following the death of the testator, Allen Dee Cook, his widow and son, as co-executors, filed the testator's 1997 will for probate in the trial court. After the will was admitted to probate, Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer, two of the testator's stepchildren, filed a complaint in the trial court seeking to establish that a prior irrevocable joint will from 1992 was the last will and testament of the testator. The trial court granted the defendants'/co-executors' motion for summary judgment after concluding: (1) that the plaintiffs' failure to produce the original of the first will gave rise to a presumption that it was revoked, and that the presumption of revocation had not been overcome by the requisite degree of proof; and (2) the plaintiffs had failed to file a properly supported claim against the estate. On the first appeal in this case, we concluded that there was a genuine issue of material fact regarding whether the 1992 will had been presumptively revoked, and the plaintiffs' claim could not be dismissed on that basis at the summary judgment stage in the proceedings. However, we also concluded that the Trial Court correctly determined that the plaintiffs' claim should be dismissed because they failed to properly file that claim. On remand, the parties disagreed as to whether the plaintiffs' claim that there was a prior irrevocable will survived our first opinion. The Trial Court held that our conclusion in the first appeal that the plaintiffs had failed to file a properly supported claim resulted in that entire claim being dismissed, regardless of whether there was a factual dispute as to the first will having been revoked. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

David M. Cook and Virginia Patterson Bozeman, Memphis, Tennessee, for the Appellants Lisa Donnelly Gelfand and Sandra Schwitzer.

Lois B. Shults-Davis, Erwin, Tennessee, and Anthony A. Seaton, Johnson City, Tennessee, for the Appellees Jo Ann Cook and Ronald Cook, Co-Executors.

OPINION

Background

This appeal involves interpretation of a previous opinion issued by this Court in the same litigation. In December of 2004, we issued our opinion in *In re Estate of Allen Dee Cook*, No. E2004-00293-COA-R3-CV, 2004 WL 3021131 (Tenn. Ct. App. Dec. 30, 2004), *no appl. perm. appeal filed*. We discussed at length in that opinion the somewhat convoluted facts and history giving rise to the first appeal. Seeing no need to reinvent the wheel, we quote liberally from our first opinion:

> The testator, [Allen Dee Cook], married the plaintiffs' mother, Joy Donnelly, in 1969. At the time of their marriage, each of the parties had children from previous marriages. The testator had three children - Allen Dee Cook, Jr., Kenneth Allee Cook, and Ronald S. Cook ("the Cook children") - and his wife had four children - Ted Alan Donnelly, Sandra Donnelly Schweitzer, Susan Donnelly Crowe, and Lisa Donnelly Gelfand ("the Donnelly children"). Each of the parties also owned property when they married. The testator owned 40 acres of land in Florida. His wife owned a residence and commercial property in Erwin, a one-half interest in a farm in Jonesborough, and a one-half interest in a furniture store in Erwin. Following their marriage, the testator and Ms. Cook sold the Erwin residence and built a house on land she owned behind that property. When that house was later sold, they built and moved into a house on Galax Drive in Erwin.
>
> Ms. Cook died on January 30, 1993. The plaintiffs[, Lisa Donnelly Gelfand and Sandra Schwitzer,] contend that, prior to their mother's death, she and the testator executed a joint will providing for the disposition of their property. This will ("the 1992 will"), according to the plaintiffs' contention, was executed in Louisiana on March 17, 1992. A document, which was ultimately filed in the trial court by the plaintiffs, purports to be a copy of the 1992 will as executed. It reflects the appointment of the plaintiffs as the co-executors of that will if the surviving spouse is unable or unwilling to serve as the executor/executrix. The proffered document further provides for the following distribution of the estate upon the death of the surviving spouse: the Galax Drive property to the Donnelly children; the Florida property to the Cook children; and the proceeds of the testator's IRA account to be divided equally among the seven children.

The document purporting to be a copy of the 1992 will as executed was proffered by the plaintiffs along with copies of two executed memoranda, one signed by the testator and the other signed by Ms. Cook. Both memoranda were signed under oath. The will and the memoranda were all dated March 17, 1992.

The two memoranda, copies of which are in the record before us, are substantially identical. The one identifying Allen Dee Cook as testator provided that "[i]t is [the testator's] intention to enter into a contract and reciprocal will with [Ms. Cook]." It also provided that it was the testator's "intent that [the document would] bind both of them" to the provisions of the will. The other memorandum identified Ms. Cook as testator and contains the same language.

On May 4, 1996, the testator married Jo Ann Parsley. The testator executed a subsequent will on November 26, 1997 ("the 1997 will"). The 1997 will stated that by making the will, the testator "hereby revok[ed] all instruments of a testamentary nature heretofore made by [him]." The will provided, in relevant part, that a life estate in the Galax Drive residence would pass to his widow, and the remainder would pass in one-eighth shares to his widow and the seven children. The Florida property was devised to his son, Kenneth Allee Cook. Other than his household goods, personal effects, art, and his 1996 automobile, all of which items were the subject of specific bequests, the remaining estate was bequeathed to his wife and the seven children in equal shares.

The testator died on December 21, 1997. The defendants, [Jo Ann Cook and Ronald Cook,] who were designated in the 1997 will as the co-executors of his estate, offered the 1997 will for probate in January, 1998. The Donnelly children were notified by letter dated January 8, 1998, that the testator had passed away and that the 1997 will would be tendered for probate. A notice to creditors was published in the newspaper in January, 1998.

On March 6, 1998, the plaintiffs responded to the letter by filing a "Complaint After Probate" in the trial court, averring that the 1997 will was not the testator's true will. Rather, they alleged, the 1992 will, executed jointly with Joy Donnelly Cook, was the true last will of the testator. In particular, the plaintiffs averred that "once that joint document [*i.e.*, the 1992 will] was duly executed before the proper witnesses it became a contract by and between the two parties thereto and, it could not be changed thereafter without the by [sic]

consent of both makers." Consequently, the plaintiffs alleged that they were "under a clear fiduciary obligation to uphold the word and legal effect of this prior joint will by presenting same to the [c]ourt for consideration and by asserting that the [1997 will] now probated is, in fact, not the true and valid Last Will and Testament of [the testator]." The plaintiffs referred to the joint will in their complaint, indicating that "[a] copy of that joint Will is attached hereto and intended to be read as an integral part hereof." Despite this assertion, the record reflects that the "Complaint After Probate" was filed *without* attachments.

In the alternative, the plaintiffs alleged that the 1997 will, which had been previously admitted to probate in common form, was not the true will of the testator because the testator was of unsound mind at the time of its execution and he was unduly influenced to make the second will. In particular, they averred that shortly before executing the 1997 will, the testator "wrongfully or unknowingly" transferred his ownership in various bank accounts into the names of his new wife and the Cook children, despite his intention expressed in the 1992 will that all property would be divided equally among the Cook and the Donnelly children.

The "Complaint After Probate" asked that the 1992 will "be declared the true and valid Will and Testament of Allen Dee Cook, be certified to the Circuit Court of this County to the end that an issue be made there to try its validity and the validity of all others." The complaint was signed by the plaintiffs Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer. It contains the following acknowledgment of Ms. Gelfand before a notary public:

> Personally appeared before me, a Notary Public in and for the State and County aforesaid, Lisa Donnelly Gelfand, Petitioner in this action, personally known to me (or satisfactorily proven to be the person making oath herein), and she makes oath in due form of law that the facts contained in this Complaint to Contest Will After Probate, is true to the best of her knowledge, information and belief.

The complaint contains no other oaths.

In response to the plaintiffs' complaint, the defendants filed a motion to dismiss on April 1, 1998, based upon the following

grounds: that the plaintiffs failed to file any proof or even a copy of the 1992 will; that the 1992 will failed to meet the requirements of Tenn. Code Ann. § 32-3-107 (2001) regarding the establishment of a contract to make a will or not to revoke a will; that the will sought to be probated was not properly drafted; that the plaintiffs had no standing to bring this action; and that the complaint failed to state a claim upon which relief can be granted.

It appears that in February, 1999, more than a year after the testator's death, the parties appeared before the trial court. At that time, the court directed the plaintiffs to file the original of the 1992 will within 30 days.

On March 16, 1999, in response to the trial court's directive to produce the 1992 will, the plaintiffs submitted a statement asserting that the original 1992 will and the original of the two memoranda of understanding, the one executed by the testator and the one executed by Joy Donnelly Cook, were "not available" to the plaintiffs. The plaintiffs further averred, however, that the existence of the will could be demonstrated by affidavits from the plaintiffs as well as the affidavit of Elizabeth Williams, the Louisiana attorney who witnessed the execution of the 1992 will.

* * *

While the plaintiffs furnished a copy of the 1992 will on March 16, 1999, they contend that a copy had also been affixed to the original complaint filed on March 6, 1998. As we have previously noted, the record before us does not otherwise substantiate this latter contention.

The case was subsequently removed to circuit court upon motion of the defendants. The plaintiffs later filed a complaint in circuit court to enforce a contract to make a will along with a petition for certiorari. The pleadings were consolidated on December 20, 1999. In circuit court, the defendants moved for summary judgment on the grounds that the testator was, in fact, competent at the time the 1997 will was executed, and that the 1992 will contained no contract term proving that the joint will was irrevocable. In its order entered April 6, 2000, the circuit court denied summary judgment on the issue of testamentary capacity. As to whether the 1992 will contained the statutory language required by Tenn. Code Ann. § 32-3-107(a)(3) to make a will irrevocable, the circuit court initially found that the will

did not contain the required statutory language. However, the court subsequently reversed its decision on this issue, citing lack of jurisdiction to adjudicate the breach of contract claim.

On remand of the breach of contract claim to the trial court, that court was called upon to rule upon the issue of whether the parties had entered into a contract to make an irrevocable joint will. Following the receipt of oral argument on February 23, 2002, the trial court entered an order on April 24, 2002, denying the defendants' motion for summary judgment as to "the assertion that no contract term existed providing that the alleged will was 'irrevocable'." It did so because it found that the copy of the 1992 will evidenced the testator's intent to enter into a contract and reciprocal will with Joy Donnelly Cook. The trial court reserved ruling, however, on the following issues: whether enforcement of the contract was procedurally improper given the fact that no claim was filed against the estate; whether lack of an original will raised a presumption that one or both testators revoked the will; and whether the *in terrorem* clause contained in the 1997 will necessitated a holding that the plaintiffs had forfeited their legacies by filing this action.

The trial court addressed the issues that remained in an order entered on November 21, 2003. In that order, it decreed as follows:

> Plaintiffs' claim of irrevocability of the [1992 will] is *denied*, no proper claim having been filed in probate.
>
> [The 1992 will] is hereby *revoked* by the absence of an original and the execution by [the testator] of the subsequent November 26, 1997 will.
>
> The *in terrorem* clause does not apply to the facts presented before this Court at the present time.

(Paragraph numbering omitted; emphasis in original). It is from this order that the plaintiffs appeal.

In re Estate of Allen Dee Cook, 2004 WL 3021131, at **1-4 (footnotes omitted).

There essentially were three issues in the first appeal. One of the issues was whether the Trial Court erred when it granted summary judgment to the defendants on the basis that the 1992 will had been presumptively revoked and there was insufficient evidence to overcome that presumption. Another, and ultimately dispositive, issue was whether the Trial Court correctly held

that the plaintiffs failed to properly bring a claim against the estate alleging that the testator had contractually agreed not to revoke the 1992 will. The third issue was raised by the defendants and involved their claim that the Trial Court erred when it found the *in terrorem* clause contained in the 1997 will was not implicated. *In re Estate of Allen Dee Cook*, 2004 WL 3021131, at *5.

In a nutshell, we concluded that there was a genuine issue of material fact regarding whether the 1992 will had been presumptively revoked, and the plaintiffs' beach of contract claim could not be dismissed on that basis at the summary judgment stage in the proceedings.[1] *In re Estate of Allen Dee Cook*, 2004 WL 3021131, at **9, 10. However, we also held that the Trial Court correctly granted summary judgment when it determined that the plaintiffs' breach of contract claim should be dismissed because the plaintiffs failed to properly file that claim. We stated:

> While the "Complaint After Probate" was timely filed - being filed within three months of the testator's death - it totally failed to comply with … Tenn. Code Ann. § 30-2-307(b). First, there is no credible evidence that the critical written documents underlying the claim - the copies of the 1992 will and related memoranda, all allegedly signed on the same date - were filed with the claim. The only credible evidence is that they first were brought to the trial court's attention some 15 months after the testator's death. Furthermore, it is clear that the claim filed on March 6, 1998, does not contain the oath mandated by the above-referenced statute. In fact, the requisite oath was never filed in this case at any stage in the proceedings.
>
> Given the record before us, we hold that the defendants were entitled to summary judgment on their defense that the plaintiffs did not file a properly-supported claim with the requisite oath. While the "Complaint After Probate," construed most favorably to the plaintiffs, was timely filed, it was not in proper form and we believe the trial court reached the correct conclusion when it disallowed it by way of summary judgment.

In re Estate of Allen Dee Cook, 2004 WL 3021131, at *9.

[1] For the sake of brevity and because our conclusion on this issue from the first appeal is the law of the case, we will not state in this opinion all of the facts we relied upon in reaching that conclusion.

Finally, we determined that the Trial Court correctly concluded that summary judgment was not appropriate on the defendants' claim that the *in terrorem* clause was implicated in this case.[2]

After discussing all three issues, we ended our first opinion with the following conclusion:

> We affirm so much of the trial court's judgment as holds (1) that the plaintiffs failed to file a properly-supported claim, with the statutorily-mandated oath, for breach of contract not to revoke the earlier will; and (2) that there is a genuine issue of material fact regarding the enforcement of the *in terrorem* clause against the plaintiffs. In all other respects, we reverse the trial court's judgment. *It results that the plaintiffs' claim for breach of contract not to revoke the 1992 will is hereby dismissed* with costs on appeal and at the trial level taxed to Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer. This case is remanded to the trial court for the collection of that court's costs, pursuant to applicable law.

In re Estate of Allen Dee Cook, 2004 WL 3021131, at *11 (emphasis added).

On remand, the plaintiffs attempted to pursue their breach of contract claim on the basis that we held there was a genuine issue of material fact as to whether the 1992 will had been presumptively revoked. The defendants objected, arguing that even though there was a genuine issue of material fact as to whether the 1992 will had been presumptively revoked, this Court had nevertheless dismissed that claim when we determined that the plaintiffs had not filed a properly supported claim as required by Tenn. Code Ann. § 30-2-307(b). The Trial Court agreed with the defendants, and this second appeal followed. The plaintiffs raise the following issue:

> Did [the Trial Court] correctly interpret this Court's December 30, 2004 decision in In re: Estate of Allen Dee Cook, E2004-00293-

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[2]The *in terrorem* clause in the 1997 will stated:

> In the event that any of the beneficiaries of this will, other than the Co-Executors and Executrix hereinbefore name [sic], should contest said will or bring any suit regarding my estate, such contestant by such action on his part shall forfeit all of the property that he or she would otherwise [sic] under this will, and the bequest or devised property to such beneficiary shall be revoked and pass instead under the residuary clause hereof.

In re Estate of Allen Dee Cook, 2004 WL 3021131, at *10. We affirmed the Trial Court's conclusion that there was a material factual issue as to whether "the plaintiffs acted 'with somewhat reasonable justification' in contesting the 1997 will, and in pursuing their claim pertaining to the irrevocability of the 1992 will." *In re Estate of Allen Dee Cook*, 2004 WL 3021131, at *10.

> COA-R3-CV, or does a question of fact as to the presumption of revocation created by the lost 1992 will remain to be tried by the Unicoi County Probate Court?

The defendants argue that the Trial Court was correct in concluding that the plaintiffs' breach of contract claim was a dead issue. The defendants further claim that the present appeal is frivolous and they should be awarded their attorney fees incurred on this appeal.

Discussion

The interpretation of our opinion in the first appeal presents a question of law. Our review of legal issues is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The Trial Court originally dismissed the plaintiffs' claim for two alternative reasons, i.e., (1) because the undisputed material facts showed that the 1992 will had been presumptively revoked and there was insufficient evidence to overcome that presumption; and (2) because the plaintiffs had not filed a properly supported claim as required by Tenn. Code Ann. § 30-2-307(b). Each basis for the dismissal was put at issue in the first appeal and we, therefore, discussed both of the Trial Court's reasons for dismissal.

In order for the plaintiffs to have avoided our affirming the grant of summary judgment in the first appeal, plaintiffs would have had to succeed in obtaining a reversal of both grounds. In other words, they would have had to show *both* that there were material facts in dispute as to whether the 1992 will had been presumptively revoked, and that they had filed a properly supported claim as required by Tenn. Code Ann. § 30-2-307(b). If plaintiffs lost on either of these two issues, the end result would be the granting of summary judgment and the resulting dismissal of their breach of contract claim would be affirmed. This is exactly what happened in the first appeal when plaintiffs were successful in challenging only one of the two alternative bases relied upon by the Trial Court. It is for this very reason that we stated in our conclusion in the first appeal that "[i]t results that the plaintiffs' claim for breach of contract not to revoke the 1992 will is hereby dismissed …." *In re Estate of Allen Dee Cook*, 2004 WL 3021131, at *11.

As we understand the basis for the plaintiffs' argument on remand, and now before us in this appeal, plaintiffs continue to argue as stated in their brief that "[i]f the March 1992 Will was not revoked prior to Joy Donnelly Cook's death, it could not have been revoked by Allen D. Cook following her death. If the March 1992 Will could not be revoked by Allen D. Cook, it was not revoked by his subsequently executed will, making the March 1992 Will the proper document to be probated." Plaintiffs on remand attempted to reargue their breach of contract claim by taking the position that Allen D. Cook could not revoke his Will after the death of Joy Donnelly Cook because to do so would have been a breach of contract. Plaintiffs' argument is unpersuasive because an irrevocable will can be revoked, with such a revocation giving rise to a breach of contract claim,

which is the exact claim for which summary judgment was granted and affirmed by this Court in the first appeal. The Trial Court properly interpreted our first opinion and correctly prevented the plaintiffs from further pursuing, even with a slightly different approach, their already dismissed breach of contract claim. The judgment of the Trial Court is, therefore, affirmed.

The next issue involves the defendants' claim that the present appeal is frivolous. A frivolous appeal is one that is devoid of merit or one in which there is little prospect that an appeal can ever succeed. *See Morton v. Morton*, 182 S.W.3d 821 (Tenn. Ct. App. 2005) (citing *Industrial Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995)). We are at a loss as to how plaintiffs could reasonably believe from reading our first opinion that their breach of contract claim survived when we stated clearly in our conclusion that "plaintiffs' claim for breach of contract not to revoke the 1992 will is hereby dismissed …." We, therefore, feel constrained to hold that the plaintiffs' continued pursuit of that claim and this second appeal had absolutely no chance of success. On remand, the Trial Court is instructed to determine the defendants' reasonable attorney fees incurred on this appeal and award defendants a judgment in that amount.

The final issue involves a motion filed on the day of oral argument. This motion was filed by the plaintiffs and is titled "Motion to Submit the Case for Decision on the Record and Appellant's Brief." The plaintiffs claim we should totally disregard the defendants' brief because it was filed two days late. This motion is denied.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for further proceedings consistent with this opinion and for collection of the costs below. Costs on appeal are taxed to the Appellants, Lisa Donnelly Gelfand and Sandra Schwitzer, and their surety.

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D. MICHAEL SWINEY, JUDGE